

# In the Supreme Court

OF THE

United States

OCTOBER TERM 1976

No.

76-914

C. I. MORTGAGE GROUP, a real estate investment trust,  
and C. I. PLANNING CORPORATION, a corporation,  
*Petitioners,*

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR  
THE COUNTY OF SAN FRANCISCO,  
*Respondent.*

(BANKAMERICA REALTY SERVICES, INCORPORATED,  
a corporation,  
*Real Respondent in Interest.*)

**PETITION FOR A WRIT OF CERTIORARI**  
**to the Court of Appeal of the State of California,**  
**in and for the First Appellate District**

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Petitioners C. I. Mortgage Group (hereinafter "CIMG") and C. I. Planning Corporation (hereinafter "CIPC") respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the First Appellate District entered in this proceeding on August 23, 1976.

### OPINIONS BELOW

No opinions have been rendered in this matter. The order of the Superior Court of the State of California for the County of San Francisco entered July 20, 1976 denying petitioners' Motion to Quash Service of Summons, the order of the Court of Appeal of the State of California in and for the First Appellate District entered on August 23, 1976 denying petitioners' Petition for Writ of Mandate and Notice of the Order of the Supreme Court of California entered on October 21, 1976 denying petitioners' Petition for Hearing, appear in the appendix hereto.

### JURISDICTION

The Order of the Court of Appeal of the State of California in and for the First Appellate District was entered on August 23, 1976. A timely petition for hearing addressed to the Supreme Court of California was denied on October 21, 1976 and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

### QUESTIONS PRESENTED

1. Whether California may validly assert *in personam* jurisdiction over a foreign lending institution and its non-resident advisor with respect to claims which are not related in any way to California, where historically the only connection such lending institution has had with California was that a minute per-

centage of the total loans made by such institution were secured by property located in California.

2. Whether California Corporations Code §6451 relating to the appointment of agent for service of process provision set forth in California Corporations Code §6451 may constitutionally operate to confer *in personam* jurisdiction over a foreign lending institution and its non-resident advisor with respect to claims unrelated to lending activities in California, especially where service of process is not made in accordance with that statute, and if so whether the statute does confer *in personam* jurisdiction under the circumstances described above.

### STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure §410.10 provides:

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

California Corporations Code §6451 provides:

"Any foreign lending institution which has not qualified to do business in this State and which engages in any of the activities set forth in Section 6450 hereof shall be deemed to have appointed the Secretary of State of this State as its agent for the purposes for which resident corporate agents are required under the laws of this State and, on or before June 30th of each year, shall file with the Secretary of State a statement showing its principal place of business

to which any notice or process may be sent in the manner and with the effect as provided in Sections 6502 and 6503, and shall pay a fee of fifty dollars (\$50)."

California Corporations Code §6450 is set forth in the Appendix.

#### STATEMENT OF THE CASE

Petitioners are defendants in an action entitled *BankAmerica Realty Services, Incorporated v. C.I. Mortgage Group and C.I. Planning Corporation*, action No. 698935, now pending in respondent Court. The plaintiff corporation in that action is named in this petition as real respondent in interest (hereinafter referred to as "Bank").

The action was brought by Bank against petitioners alleging causes of action for conversion, breach of trust, breach of contract, negligence and a common count for money had and received. The complaint is based upon a transaction involving a group of lenders, including Bank and petitioner CIMG, who entered into a written participation agreement, consummated in Boston, Massachusetts, in a \$62,000,000.00 first mortgage loan, which closed in New York City, to finance construction of an apartment project in New Jersey. Specifically, the complaint arises from a \$2,000,000.00 advance to the borrower, a New Jersey limited partnership, of which \$500,000.00 was Bank's pro rata share. The decision to make the advance was reached at a meeting held among officers of petition-

ers CIPC, Bank, the borrower and other participants in the original agreement. The meeting was held at CIPC's New York office, where all other meetings among Bank's representatives and those of CIPC concerning the loan had occurred. Other than these New York meetings, all other communications between petitioners CIPC and Bank were by mail or by telephone.

Relevant to the questions presented regarding the constitutional limits of jurisdiction are the following facts relating to petitioners' activity in California. Petitioner CIMG, a real estate investment trust, is a business trust organized and existing under Massachusetts law with its principal place of business in New York City. Petitioner CIPC is a New York corporation with its principal offices in New York City and acts as investment advisor to petitioner CIMG. Neither petitioner has ever qualified to do business in California. Neither petitioner has ever owned or leased any real property, leased or occupied office space, maintained a post office or other office address, had a telephone directory listing, or ever had any employees based in California.

Petitioner CIMG's investments have been in one of the two following modes: (1) the purchase from another lending institution (the "seller-lender") of a participatory interest in a loan secured by real property, which loan was made and owned by the seller-lender; and (2) CIMG's making a secured mortgage loan directly to a borrower. Petitioner CIMG has made, under both modes, over

\$800,000,000.00 in real estate investments and loans since its inception in 1969. Under the first mode of investment, CIMG's funding and other obligations are owed to the seller-lender, and the seller-lender disburses payments to CIMG based upon an interest rate agreed upon between CIMG and the seller-lender. CIMG has no direct dealings with, obligations to or rights against the borrower in this type of transaction, and is not connected at all with the seller-lender's loan to the borrower. Petitioner CIMG has in seven instances in its history purchased participatory interests in loans totalling approximately \$28,000,000 wherein the seller-lender's loan to its borrower was secured by real property located in California. All seven of these participations were fully paid off by the end of 1972.

Under the second mode of investment, petitioner CIMG has in its history made five direct loans totalling approximately \$14,000,000 secured by real property in California. Of these, two loans remain outstanding totalling approximately \$11,000,000 and amounting to approximately 3% of petitioner CIMG's present loans and investments or about 1.4% of the loans made in its history.

None of the five direct loans referred to were in any way related to Bank or its claim against petitioners. The five loans were the result of inquiries by a mortgage broker or a borrower to petitioner CIPC in New York City; in no instance did either petitioner go into California to search out or solicit potential buyers. Petitioner CIPC did send personnel

to California to appraise properties as security for the proposed loans on isolated occasions. In each of the five loans, the borrowers personally appeared at petitioner CIMG's offices in Massachusetts for the closings where all documentation was executed. All notes were payable in Massachusetts and each loan agreement provided for application of Massachusetts law.

The loan at issue in respondent Court was closed in New York and relates to real property located in New Jersey. Neither petitioner sent representatives to or was otherwise present in California with regard to the transaction. Bank did on numerous occasions send officers and representatives to New York to meet and confer regarding the loan.

The second mortgage lender in the underlying transaction, Chase Manhattan Bank ("Chase"), will by virtue of the allegations of the complaint be an important witness, and possibly a third-party defendant, in the underlying action by virtue of its participation in the decision to make and the making of the advance in question. Because it is a national banking association established and located in New York, however, petitioners are unable to compel Chase to respond to process in California by virtue of the special venue provision contained in 12 U.S.C. §94.

The summonses and complaints directed to petitioner were served upon Mr. Tomai, president of CIPC and CIMG, in New York by registered mail and were not served upon the California Secretary of State.

On May 21, 1976 petitioners moved respondent court to quash service of summons on the ground that the petitioners had insufficient contacts with the State of California to satisfy the federal due process requirements and thereby justify assertion of jurisdiction pursuant to California Code of Civil Procedure §410.10. On July 20, 1976 respondent Court denied petitioners' motion to quash service of summons without opinion.

On August 19, 1976 petitioners timely petitioned the Court of Appeal of the State of California in and for the First Appellate District for a writ of mandate to compel respondent Court to quash service of summons on petitioners, arguing that petitioners had insufficient contacts with California to establish *in personam* jurisdiction under federal due process requirements. The Court of Appeal denied the petition without opinion on August 23, 1976.

On September 2, 1976 petitioners timely filed a petition for hearing in the Supreme Court of the State of California, again raising the federal due process issues. The petition was denied without opinion on October 21, 1976.

Petitioners have not entered a general appearance in the underlying action but have made their special appearance only for the purpose of contesting jurisdiction pursuant to California Code of Civil Procedure §418.10. Petitioners are informed and believe that should petitioners be forced to submit to discovery proceedings initiated by Bank such submission will constitute a general appearance on the part of

petitioners, thereby forfeiting their right to pursue the relief sought herein. Respondent court has ordered petitioners to answer, demur or otherwise plead to the complaint by January 7, 1977. Bank has stipulated that it will not institute discovery proceedings prior to that date. Petitioners by separate application to this Court referring to this petition seek an order staying proceedings in respondent court until this petition has been acted upon.

#### REASONS FOR GRANTING THE WRIT

##### 1. THE ORDERS BELOW CONFLICT WITH FEDERAL DUE PROCESS DOCTRINE PERTAINING TO THE PERMISSIBLE REACH OF "LONG ARM" JURISDICTION.

Long arm jurisdiction is conferred upon California courts by California Code of Civil Procedure §410.10 which states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States". Under the foregoing statute, the validity of an assertion of *in personam* jurisdiction over nonresident defendants such as petitioners is linked to Federal due process standards, which require a showing that defendants have sufficient "minimum contacts" with the forum state to make fair and reasonable the particular assertion of jurisdiction over them. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958). As further delineated by this Court in *Hanson*, "it is essential in each case that there be

some act by which the defendant purposefully avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its law", before jurisdiction may constitutionally attach. 357 U.S. at 253.

By failing to quash service of summons the California courts have failed to apply Federal due process doctrine. Neither petitioner is incorporated, organized or otherwise qualified to do business in the State of California, nor does either own real property, lease office space, have an office address or telephone listing or have any employees located or based in California. Petitioners were served with a summons and complaint at their New York City offices. No part of the underlying dispute occurred in California. Petitioners' only contact with California is that a miniscule proportion of the total amount of petitioner CIMG's loans is represented by a few past loans which have been secured by real property in California, none of which had any connection with the underlying dispute and none of which were even closed in California.

This Court has stated, "[D]ue process requires only that in order to subject a defendant to judgment *in personam*, if he be not present within the territory of the forum, he had certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, *supra*, 326 U.S. at 316. Validation of jurisdiction herein effectively rewrites *International Shoe* by allowing *in personam* jurisdiction without "minimum contacts".

California interprets Federal long arm doctrine to require that the cause of action arise out of the defendant's forum related activity or that the defendant has contacts unrelated to the cause of action of "such extension or wide-ranging proportions as to make the defendant sufficiently 'present' in the forum state to support jurisdiction over it." *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 898-899. By validating jurisdiction herein the California courts have, by example, given concrete definition to *Buckeye Boiler*. It is submitted as a matter of Federal law that the very few contacts petitioners have ever had with California, none of which were related to the instant case, cannot arise to the dignity of the "minimum contacts" envisioned by this Court, and that exercise of long arm jurisdiction certainly would offend any "traditional notions of fair play and substantial justice".

Federal doctrine clearly limits the reach of Section 410.10. California's assertion of jurisdiction necessarily demonstrates a departure from Federal doctrine inasmuch as Federal law would not support jurisdiction in the instant case. In spite of its recitations which seemingly honor Federal doctrine, in function California has unlawfully expanded its long arm jurisdiction at the expense of petitioners and other foreign business entities.

**2. MISAPPLICATION BY THE COURTS BELOW OF FEDERAL DUE PROCESS DOCTRINE PERTAINING TO "LONG ARM" JURISDICTION DEMONSTRATES THE NEED FOR FURTHER CLARIFICATION OF THE DOCTRINE BY THIS COURT.**

Although California courts recognize the applicability of the *International Shoe* line of cases (e.g. *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893 (1969)), their failure to apply *International Shoe* properly exemplifies the damaging effect of such failure on commerce. The underlying transaction herein has no relation to California. The only contacts whatever of petitioners with California arise from the small fraction of CIMG's loan portfolio secured by California real property which the California legislature itself recognizes to be an insufficient basis to assert *in personam* jurisdiction. Cal. Corp. Code §6450.<sup>1</sup> Indeed California courts recognize that even ownership of land in California, something that neither CIMG nor CIPC has ever enjoyed, is insufficient to subject a nonresident to personal jurisdiction in an unrelated cause of action. *Long v. Mishicot Modern Dairy, Inc.*, 252 Cal. App. 2d 425, 428 (1967).

<sup>1</sup>California Corporations Code §6450 provides in part:

"Any foreign lending institution including . . . (e) any foreign corporation or association authorized by its charter to invest in loans secured by real and personal property . . . shall not be considered to be doing, transacting or engaging in business in this State solely by reason of engaging in any or all of the following activities . . . :

(1) The acquisition by purchase, by contract to purchase, by making of advance commitments to purchase, or by assignment, of loans, including construction loans, or any interests therein, secured in whole or in part by mortgages, deeds of trust, or other forms of security on real or personal property in this State, if such activities are carried on from outside this State by the lending institution.

" . . . . ."

If State courts are allowed to follow only the form and not the substance of *International Shoe*, defendants will continue to be subjected to suit in foreign jurisdictions under circumstances offending "traditional notions of fair play and substantial justice." Such circumstances are exemplified by the proceedings below. The entire transaction centered around New York, all of the documents and witnesses relating to the transaction are located in New York and Chase Manhattan Bank, a key figure in the underlying transaction and a national banking association principally located in New York, is not amenable to process in California pursuant to 12 U.S.C. §94.

The instant case presents an opportunity for this Court to address the concepts of long arm jurisdiction in a context wherein the plaintiff is not a branch of state government (*International Shoe Co. v. Washington, supra*) or a hapless individual (*McGee v. International Life Ins. Co., supra*; *Hanson v. Denckla, supra*) but is instead an arm of one of the nation's largest banks. The underlying litigation herein arises among business entities in a purely commercial setting. The posture of this case and the steady erosion of the *International Shoe* standard by even well meaning state courts makes the question of long arm jurisdiction ripe for the attention of this Court.

**CONCLUSION**

For these reasons a writ of certiorari should issue to review the judgment of the Court of Appeal of the State of California.

Respectfully submitted,

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December 29, 1976.

(Appendix Follows)

**APPENDIX**

## **Appendix**

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A-1

Superior Court of the State of California  
for the City and County of San Francisco  
Department Four

—  
In Open Court, July 20, 1976  
—

No. 698 935  
—

BankAmerica Realty, etc.,	} Plaintiff,
vs.	
C.I. Mortgage Group, etc.,	
	Defendant.

Defendants' motion to quash service of summons,  
heretofore submitted, is denied.

John E. Benson, Judge

A-2

In the Court of Appeal  
State of California

First Appellate District

Division Two

1 Civil No. 39699  
Superior Court No. 698-935

C.I. Mortgage Group, etc., et al.,	}
vs.	
Superior Court, City and County of San Francisco,	
Respondent,	
Bank America Realty Services, etc.,	}
Real Party in Interest.	

[Filed Aug. 23, 1976]

BY THE COURT:

The petition for writ of mandate is denied.

Taylor, P.J.

Dated Aug. 23, 1976

A-3

Clerk's Office, Supreme Court  
4250 State Building  
San Francisco, California 94102

Oct. 21, 1976

I have this day filed Order  
Hearing Denied.  
In re: 1 Civ. No. 39699

C. I. Mortgage Group	}
vs.	
Superior Court, S.F.	

Respectfully,

G. E. Bishel  
Clerk

## CALIFORNIA CORPORATIONS CODE

§6450.

Any foreign lending institution, including, but not limited to: (a) any foreign banking corporation, (b) any foreign corporation all of the capital stock of which is owned by one or more foreign banking corporations, (c) any foreign savings and loan association, (d) any foreign insurance company or (e) any foreign corporation or association authorized by its charter to invest in loans secured by real and personal property, whether organized under the laws of the United States or of any other state, district or territory of the United States, shall not be considered to be doing, transacting or engaging in business in this State solely by reason of engaging in any or all of the following activities either on its own behalf or as a trustee of a pension plan, employee profit sharing or retirement plan, testamentary or intervivos trust, or in any other fiduciary capacity:

(1) The acquisition by purchase, by contract to purchase, by making of advance commitments to purchase, or by assignment, of loans, including construction loans, or any interest therein, secured in whole or in part by mortgages, deeds of trust, or other forms of security on real or personal property in this State, if such activities are carried on from outside this State by the lending institution.

(2) The making of physical inspections and appraisals of real or personal property securing or proposed to secure any loan by an officer or employee if the officer or employee making any physical in-

spectations and appraisals is not a resident of and does not maintain his place of business in this State.

(3) The ownership of any loans and the enforcement of any loans by trustee's sale, judicial process or deed in lieu of foreclosure or otherwise.

(4) The modification, renewal, extension, transfer or sale of loans, or the acceptance of additional or substitute security therefor, or the full or partial release of the security therefor, or the acceptance of substitute or additional obligors thereon, if the activities are carried on from outside this State by the lending institution.

(5) The maintaining and defending of any action or suits relating to loans, mortgages, deeds of trust or other security instrument or activities referred to herein or incidental thereto.

(6) The engaging, by contractual arrangement, of a corporation, firm or association, qualified to do business in this State, which is not a subsidiary or parent of the lending institution or which is not under common management with the lending institution, to make collections and to service loans in any manner whatsoever, including the payment of ground rents, taxes, assessments, insurance and the like and the making, on behalf of the lending institution, of physical inspections and appraisals of real or personal property securing any loans or proposed to secure any loans, and the performance of any such engagement.

(7) The acquisition of title to the real or personal property covered by any mortgages, deeds of trust, or other security instrument, by trustees, pledgees, or judicial sales, or by deed in lieu of foreclosure or for the purpose of transferring title to any federal agency or instrumentality as the insurer or guarantor of any loans, the maintenance or defense of any action or suit relating to the possession of the property, and the retention of title to any real or personal property so acquired pending the orderly sale or other disposition thereof. Nothing herein shall be construed as relieving any institution or corporation which operates, manages or conducts any business enterprises acquired by it upon foreclosure or in lieu of foreclosure from complying with any statute of this State otherwise applicable or from the payment of any taxes to which it would otherwise be subject by reason of the operation, management or conduct of any business enterprise.

(8) The maintenance of bank accounts in banks, authorized or licensed to do and transact a banking business in this State.

(9) The engaging in activities necessary or appropriate to carry out any of the foregoing activities.

Nothing herein shall be construed so as to permit any foreign banking corporation to maintain an office in this State otherwise than as provided by the law of this State or so as to limit the powers conferred upon any foreign banking corporation as set forth in the laws of this State or so as to permit any

foreign lending institution to maintain an office in this State except as otherwise permitted under the laws of this State. This chapter shall not be construed so as to make any act or series of acts when performed in this State by a foreign corporation constitute the doing of business in this State which would not have constituted the doing of business in this State prior to the enactment of this chapter.